

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

74576

FILE: B-207370

DATE: March 22, 1983

MATTER OF: Colonel James W. Fischer, USAF (Retired)

- DIGEST:** 1. An Air Force officer who is removed from the temporary disability retired list and placed on the active duty list for 1 day on the 31st day of the month, and retired for years of service the next day is entitled to a full month's retired pay in addition to pay for the 1 day of active duty.
2. Retired members of the armed services who perform Reserve duty, active or inactive, on the 31st day of a calendar month must waive 1 day's retired pay (or other compensation received on account of their prior service) in order to be entitled to active duty pay or inactive duty pay which would otherwise accrue for that day. This is required by 10 U.S.C. § 684.

Colonel James W. Fischer, USAF (Retired), was removed from the temporary disability retired list on October 30, 1981, because it had been determined that he was fit for duty. He was placed on the active duty list on October 31, 1981, and served only 1 day before being retired for years of service on November 1. He is entitled to active duty pay for October 31 even though he is also entitled to a full month's retired pay for the 30 days he was on the retired list in October.

This decision is in response to a request for an advance decision from an Accounting and Finance Officer, Air Force Accounting and Finance Center, and was assigned submission number DO-AF-1392 by the Department of Defense Military Pay and Allowance Committee. The accounting and finance officer questions the validity of a military pay voucher for 1 day of active duty pay which accrued on October 31, 1981. In addition, a question is asked regarding the pay entitlement of retirees who are called to Reserve duty, active or inactive, on the 31st day of a month.

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Colonel Fischer was placed on the temporary disability retired list on January 16, 1979, and remained in that status through October 30, 1981, when he was removed from the retired list because it had been determined that he was physically fit for duty. He was reappointed to the active list in the Regular Air Force for 1 day, October 31, 1981, in order to establish a basis for retirement for length of service, effective November 1, 1981.

Pay and Allowances for Active Duty

Colonel Fischer was ordered to active duty and reappointed to the active duty list of the Regular Air Force effective October 31, 1981. He did, in fact, report for active duty on that day. A member is entitled to receive active duty pay and allowances beginning on the first day of service on a call-up for active duty and such entitlement continues until he is released from such duty, plus allowable traveltime. 54 Comp. Gen. 953, 955 (1975).

Computation of pay and allowances when the member's service is for less than a month is governed by 37 U.S.C. § 1004, which provides:

"A member of a uniformed service who is entitled to pay and allowances under this title for a continuous period of less than one month is entitled to his pay and allowances for each day of that period at the rate of 1/30 of the monthly amount of his pay and allowances. The thirty-first day of a calendar month may not be excluded from a computation under this section."

Although at one time the method of computation outlined in section 1004 was available only to reservists, the section has since been construed as applying to both Reserve and Regular forces. 54 Comp. Gen. 952, 954 (1975); 46 Comp. Gen. 100 (1966). The 1 day of active duty in this case, being a period of less than a month falling on the 31st day of the month, is clearly encompassed by the language of section 1004 and, therefore, active duty pay and allowances for that day are payable.

Disability Retired Pay

Retired pay is paid monthly under the rules in 5 U.S.C. § 5505 (1976). As was stated in 48 Comp. Gen. 152, 158 (1968):

"* * * Military retired pay accrues on a monthly basis. Note 10 U.S.C. §§ 1401, 3991, 8991. Monthly compensation (including retired pay) is computed as if each month had 30 days. No compensation (and no retired pay) accrues on the 31st day of any month.* * *"

Under the monthly computation formula of 5 U.S.C. § 5505, the 31st day of a calendar month is ignored. Pay for 1 day's absence on the 31st must be forfeited under that section only if the absence is "unauthorized."

Colonel Fischer was validly reappointed and recalled to active duty on October 31 pursuant to the established procedure. The date for his voluntary retirement was also mandated since members are relieved from assignment and duty on the last day of the month and are retired effective the first day of the following month. See 5 U.S.C. § 8301 (1976); and Air Force Regulation 35-7, para. 2-7, September 15, 1981. Accordingly, the provision of 5 U.S.C. § 5505 regarding unauthorized absences is not involved in this case.

Since Colonel Fischer is entitled to temporary disability retired pay for 30 of the 31 days in October he is entitled to a full month's pay under the provisions of 5 U.S.C. § 5505. We find no legal basis to reduce his retired pay entitlement. He was in a retired status for 30 days during October 1981 and on active duty on the 31st. Therefore, Colonel Fischer is entitled to receive payment of full temporary disability retired pay for the month of October in addition to pay and allowances for active duty served on October 31, 1981. In accordance with the applicable statutory provisions, payment of the voucher for active duty pay is authorized, if otherwise correct.

Retired Reservists Generally

Regarding the propriety of paying retirees who maintain an active Reserve status and who perform

active duty or inactive duty on the 31st day of a month, entitlement to pay for these members is provided by 37 U.S.C. §§ 204 and 206, respectively. As noted above, active duty pay for a period of less than 30 days is computed under 37 U.S.C. § 1004 (1976) for both Regular members and reservists.

Under 37 U.S.C. § 206 (1976) for each period of inactive duty the reservists are entitled to 1/30th of a month's pay.

However, paying a retiree for services performed on active duty or inactive duty training as a member of the Reserves is also governed by the provisions of 10 U.S.C. § 684(a) which provide:

"(a) Except as provided by subsection (b), a Reserve of the Army, Navy, Air Force, Marine Corps, or Coast Guard who because of his earlier military service is entitled to a pension, retired or retainer pay, or disability compensation, and who performs duty for which he is entitled to compensation, may elect to receive for that duty either--

"(1) the payments to which he is entitled because of his earlier military service; or

"(2) if he specifically waives those payments, the pay and allowances authorized by law for the duty that he is performing."

Considering the provisions of 10 U.S.C. § 684 as they relate to the situation of a retiree who performs inactive duty training or less than 30 days' active duty, those provisions require waiver of retired pay in order for the member to be entitled to active duty or inactive duty pay. It may be argued that, since no retired pay accrues on the 31st day of the month under the provisions of 5 U.S.C. § 5505, a waiver of retired pay entitlements does not require the reduction of retired pay when the drill pay or active duty pay is paid for the 31st. However, the provisions of 10 U.S.C. § 684 contemplate that something will be waived in these circumstances. That is, an individual

will not be able to retain the full benefits which accrued because of prior service and the pay which accrues for the service currently being performed. On the other hand 5 U.S.C. § 5505 is a general provision concerned only with disbursing pay which accrues on a monthly basis in view of the differing lengths of months. In applying the dual compensation provision to a retired officer who was employed in a Federal civilian position on the 31st day of the month, it was held that 1 day of retired pay must be waived in order to permit payment of civilian compensation. In that case also no retired pay accrued on the 31st of the month. B-120722, October 18, 1954.

It is also noted that paragraph 30124 of the Military Retired Pay Manual, Department of Defense Manual, 1340.12M, requires the waiver of 1 day's retired pay for each calendar day of entitlement to active duty pay or drill pay. No exception is made for active duty or drill on the 31st day of a month. Regulations of the agency involved are to be given great weight in interpreting a provision of law. Thus, this regulation supports a determination that waiver of a day's retired pay or other compensation predicated on prior service is required in order for a Reserve member to be entitled to active duty or inactive duty pay for the 31st day of a month. Therefore, we find that the waiver provision (section 684) should be interpreted to mean that 1 day's retired pay must be waived even if the active duty or inactive duty training is performed on the 31st day of the month.

for 
Comptroller General
of the United States